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15 NORTHERN DISTRICT OF CALIFORNIA  
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17 SAN FRANCISCO DIVISION

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UNITED STATES OF AMERICA,	}	No. CR 10-00385 SI
Plaintiff,	}	GOVERNMENT'S MOTION FOR ORDER
v.	}	TO ABROGATE ATTORNEY-CLIENT
HUY TRINH,	}	PRIVILEGE; [PROPOSED] ORDER
Defendant.	}	

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MOTION TO ABROGATE ATTORNEY-CLIENT PRIVILEGE; [PROPOSED] ORDER  
CR 10-00385 SI

1      **I.      INTRODUCTION**

2      On March 23, 2012, in accordance with a plea agreement pursuant to Rules 11(c)(1)(A)  
 3      and 11(c)(1)(C) of the Federal Rules of Criminal Procedure, Huy Trinh (“Petitioner”) entered a  
 4      guilty plea to one count of conspiracy to manufacture and distribute marijuana and one count of  
 5      possession of a firearm in furtherance of drug trafficking crime. On June 22, 2012, Petitioner  
 6      was sentenced to a prison term of 180 months. Petitioner was represented in the underlying  
 7      criminal matter by appointed counsel, Richard Tamor.

8      Petitioner made a motion pursuant to 28 U.S.C. § 2255, generally alleging ineffective  
 9      assistance of counsel by his attorney, Richard Tamor. Petitioner filed his motion on June 5,  
 10     2013. On June 27, 2011, the Court characterized Petitioner’s motion as seeking relief under 28  
 11     U.S.C. § 2255, and ordered the government to file a response within 90 days. In order to prepare  
 12     a thorough response to Petitioner’s motion, the United States seeks abrogation of the attorney-  
 13     client privilege between Petitioner and Mr. Patton so that it may obtain a declaration from Mr.  
 14     Tamor in connection with the Government’s opposition.

15     **II.      ARGUMENT**

16     In his Section 2255 motion, Petitioner alleges that his constitutional right to effective  
 17     assistance of counsel was violated by his attorney Richard Tamor. By raising a Sixth  
 18     Amendment claim of ineffective assistance of counsel, Petitioner has waived the attorney-client  
 19     privilege as to the matters raised in his Section 2255 motion. “It has long been the rule in the  
 20     federal courts that, where a habeas petitioner raises a claim of ineffective assistance of counsel,  
 21     he waives the attorney-client privilege as to all communications with his allegedly ineffective  
 22     lawyer.” *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003); *accord Osband v. Woodford*,  
 23     290 F.3d 1036, 1042 (9th Cir. 2002) (stating that “a petitioner in a habeas corpus action who  
 24     raises a Sixth Amendment claim of ineffective assistance of counsel waives the attorney-client  
 25     privilege as to the matters challenged”).

26     This Court has authority to direct Mr. Tamor to provide information to the Government  
 27     relevant to Petitioner’s ineffective assistance of counsel claims. *See Zabala v. United States*, 962  
 28     F.Supp. 244, 248 (D. Puerto Rico 1997) (directing respondent to “include a statement by

1 petitioner's former counsel as to the circumstances surrounding the decision to forego the filing  
 2 of an appeal"); *Harrelson v. United States*, 967 F.Supp. 909, 914-15 (W.D. Tex. 1997) ("the  
 3 former defense attorney may execute and furnish to the Government for submission to the Court  
 4 a detailed affidavit outlining the scope of said counsel's pretrial investigation, the information the  
 5 attorney developed prior to trial, and the rationale behind said counsel's tactical decisions, such  
 6 as whether to present certain evidence or witnesses and whether to pursue certain defense  
 7 strategies as opposed to others"); *see also United States v. Emery*, 258 F.Supp. 2d 1021, 1025  
 8 (W.D. Mo. 2003) (considering trial counsel's affidavit in resolving a petitioner's ineffective  
 9 assistance of counsel claim).

10 The government cannot protect this prosecution against Petitioner's allegations of  
 11 ineffective assistance of counsel against Mr. Tamor without obtaining information from  
 12 Mr. Tamor that would clearly refute those claims. "The rule that a litigant waives the attorney-  
 13 client privilege by putting the lawyer's performance at issue" is known as the "fairness principle"  
 14 – and "is often expressed in terms of preventing a party from using the privilege as both a shield  
 15 and a sword." *Bittaker v. Woodford*, 331 F.3d 715, 718-719 (9th Cir. 2003). As the Ninth  
 16 Circuit recognized, "in practical terms, this means that parties in litigation may not abuse the  
 17 privilege by asserting claims the opposing party cannot adequately dispute unless it has access to  
 18 the privileged materials." *Id.* at 719, citing *Chevron v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th  
 19 Cir. 1992) ("The privilege which protects attorney-client communications may not be used both  
 20 as a sword and a shield.").

21 For the United States to be able to prepare its opposition to defendant's Section 2255  
 22 motion, it will need to discuss the matters raised in Petitioner's motion with Richard Tamor and  
 23 obtain a declaration and other relevant evidence from him. Accordingly, the United States  
 24 hereby moves for an order to abrogate the attorney-client privilege between Petitioner and Mr.  
 25 Tamor as to the matters raised in Petitioner's Section 2255 motion.

26 **III. CONCLUSION**

27 For the reasons set forth above, the United States requests an order abrogating the  
 28 attorney-client privilege between Petitioner and Mr. Tamor as to the matters raised in Petitioner's

1 Section 2255 motion, and directing Mr. Tamor to provide the Government with a declaration  
2 regarding the matters raised in the 2255 motion.

3  
4 DATED: August 22, 2013

Respectfully submitted,

5 MELINDA HAAG  
6 United States Attorney

7 /s/  
8 AARON D. WEGNER  
9 Assistant United States Attorney

## **[PROPOSED] ORDER**

Petitioner Huy Trinh entered a guilty plea to one count of conspiracy to manufacture and distribute marijuana and one count of possession of a firearm in furtherance of a drug trafficking crime and was sentenced to 180 months in prison. Subsequently, Petitioner filed a motion under 28 U.S.C. § 2255 alleging a claim of ineffective assistance of counsel. Richard Tamor represented Petitioner in the underlying criminal matter. The Court set a briefing schedule directing Respondent to file a response to the motion.

Respondent now moves the Court for an Order abrogating the attorney-client privilege so that the Government may prepare its response, for which it will need to communicate with Mr. Tamor and obtain a declaration from him. “It has long been the rule in the federal courts that, where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer.” *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003); *accord Osband v. Woodford*, 290 F.3d 1036, 1042 (9th Cir. 2002) (“a petitioner in a habeas corpus action who raises a Sixth Amendment claim of ineffective assistance of counsel waives the attorney-client privilege as to the matters challenged”).

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondent's motion to abrogate the attorney-client privilege between Petitioner and Mr. Tamor is GRANTED, as to the matters challenged.

2. Richard Tamor shall respond to Respondent's inquiries pertaining to Petitioner's motion under 28 U.S.C. § 2255. Richard Tamor shall provide Respondent with an affidavit and with discovery relevant to said motion.

IT IS SO ORDERED.

8/26/13

Susan Illston  
HON. SUSAN ILLSTON  
United States District Judge

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee of the office of the United States Attorney, Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned certifies that she caused a copy of the

**GOVERNMENT'S MOTION FOR ORDER  
TO ABROGATE ATTORNEY-CLIENT PRIVILEGE; [PROPOSED] ORDER**

in the case of **UNITED STATES V. HUY TRINH**, CR-10-00385 SI, to be served on the party in this action, by placing a true copy thereof in a sealed envelope, addressed as follows which is the last known address:

Huy Trinh  
14625-111  
FCI Herlong  
Federal Correctional Institution  
P.O. Box 800  
Herlong, CA 96113

— (By Personal Service), I caused such envelope to be delivered by hand to the person or offices of each addressee(s) above.

\_\_\_\_ (By Facsimile), I caused each such document to be sent by Facsimile to the person or offices of each addressee(s) above.

X (By Mail), I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Oakland, California.

\_\_\_\_ (By Fed Ex), I caused each such envelope to be delivered by FED EX to the address listed above.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 22, 2013

Jeanne Carstensen  
Jeanne Carstensen  
Legal Assistant